No. 87-746

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

MICHAEL H.,

Plaintiff, Cross-Defendant and Appellant,

and

VICTORIA D., a minor by and through her Guardian Ad Litem, LESLIE SHEAR,

Defendant, Cross-Complainant and Appellant,

vs.

GERALD D.,

Defendant, Cross-Defendant and Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS AND BRIEF AMICUS CURIAE OF NATIONAL COUNCIL FOR CHILDREN'S RIGHTS IN SUPPORT OF APPELLANTS

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MICHAEL H.,
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vs.

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and Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF THE STAT_ OF CALIFORNIA**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The National Council for Children's Rights, Inc. (NCCR) hereby respectfully moves for leave to file the attached

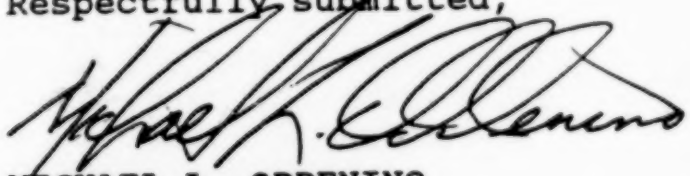
brief amicus curiae in support of appellants. The consent of the attorneys for appellants has been obtained. The consent of the attorney for appellee was requested but refused.

The attached brief focuses on whether the granting of a motion for summary judgment, pursuant to California Evidence Code section 621, impermissibly impinges on the minor child's fundamental liberty interest in a parent-child relationship such as to deny her equal protection of the law and due process of law. NCCR contends that section 621, as applied, unconstitutionally bars evidence concerning the child's best interests.

Counsel for Amicus is familiar with the issues involved in this case and believes there is a necessity for additional argument on behalf of the minor child's position that section 621

minor child's position that section 621 cannot constitutionally be applied to deny the child a determination of paternity based on scientific evidence or to terminate an existing parent-child relationship. The presentation of NCCR's perspective will permit a more complete analysis of the issues raised.

Respectfully submitted,



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May 4, 1988

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BRIEF AMICUS CURIAE OF NATIONAL COUNCIL FOR CHILDREN'S RIGHTS IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

NCCR is a non-profit, tax exempt organization based in Washington, D.C. dedicated to provide education, and research for the furtherance of child-

ren's welfare and children's rights under the United States Constitution and other applicable laws. NCCR has participated in this case on behalf of the minor child in the lower court and continues its participation herein because this matter involves profoundly significant issues regarding children's best interests and society's evolving recognition of those best interests.

ARGUMENT

I. THE MINOR CHILD'S INTEREST IN A PARENT-CHILD RELATIONSHIP CONSTITUTES A FUNDAMENTAL LIBERTY INTEREST GIVING RISE TO THE FULL PANOPLY OF CONSTITUTIONAL PROTECTIONS.

The issues raised in the instant case and the ultimate resolution of those issues will undoubtedly affect, in the most intimate and decisive fashion, the entire course of the minor child's life. While the adult parties may garner the bulk of attention in asserting and

denying various legal rights it is critical to consider that for the minor child, Victoria, there may be no greater moment in her life.

This Court long ago noted that a parent's right to "the companionship, care, custody, and management of his or her children" is an interest "far more precious " than any property right. May v. Anderson, 345 U.S. 528, 533, 97 L. Ed. 1221, 73 S. Ct. 840, 843 (1952). In Lassiter v. Department of Social Services, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 102 S. Ct. 2153, 2159-60 (1981), the Court stressed that the parent-child relationship "is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection'" quoting Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed 2d 551, 92 S. Ct. 1208 (1972). See also

Franz v. United States, 707 F.2d 582, 594-602 and 712 F.2d 1428 (D.C. Cir. 1983) (interest of non-custodial parent in consortium with child constitutionally protected); Kelson v. Springfield, 767 F.2d 651, (9th Cir. 1985)(parent has constitutionally protected liberty interest in the companionship and society of his or her child); Bell v. City of Milwaukee, 746 F.2d 1205, 1242-45 (7th Cir. 1985)(parent-child relationship a liberty interest protected by the Due Process Clause of the Fourteenth Amendment).

Child custody and paternity determinations involve a judicial intervention and restructuring of family life of the parties before the court. The fundamental liberty interests affected by such determinations demand the most vigorous protection of the law.

> [A] parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his children. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsible, reliable adult.

Franz v. United States, 707 F. 2d 582, 599 (D.C. Cir. 1983). (Emphasis added).

What greater right could any minor child have subject to judicial determination? None.

> [T]he establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights. To hold a child bound prospectively by a finding of nonpaternity in a divorce action in which the child was not a party would be to allow the conduct of the mother to foreclose the most fundamental right a child possesses in our system of jurisprudence.

Ruddock v. Ohls, 91 Cal. App. 3d 271,

277-78, 154 Cal. Rptr. 87, 91 (1979). (Emphasis added).

Victoria's interest in the case at bar, the determination of her parent-child relationship with all the attendant consequences for her life, is unquestionably the most fundamental right she possesses in our system of jurisprudence. The child's right to consortium with her parents demands full constitutional protection.

II. THE MINOR CHILD WAS DENIED EQUAL PROTECTION OF THE LAW BY THE LOWER COURT'S RULING THAT THE CONCLUSIVE PRESUMPTION OF CALIFORNIA EVIDENCE CODE SECTION 621 BARRED A DETERMINATION OF PATERNITY.

California Evidence Code section 621, subdivision (a) provides: "Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of

the marriage." Subdivision (b) allows the mother or the presumed father (husband) to rebut the presumption of subdivision (a) but makes no provision whatsoever for the child, such as Victoria, to rebut the presumption.

California Evidence Code section 621's absolute exclusion of the minor child as one who can rebut the presumption is a fatal constitutional defect as the section is applied to deny Victoria a fundamental liberty interest. Victoria is being denied her constitutional right to equal protection under the law guaranteed to her by the Fourteenth Amendment to the U.S. Constitution.

Victoria is denied the most fundamental right a child brings to the judicial system, that of establishing and preserving a parent-child relationship, by the application of section 621 which

allows mothers and presumed fathers to rebut the presumption of legitimacy but denies her that same opportunity.

The state's claim of a compelling state interest which allegedly shields section 621 from Victoria's equal protection challenge boils down to unsupported claims of family stability.[1] Not only is the purported state interest of dubious strength in light of a changing social structure characterized by unprecedented numbers of children of

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1. The state interests underlying the section 621 presumption have been identified as 1) preserving the integrity of the family unit, 2) encouraging marriage, 3) ensuring financial support for minor children, 4) protecting children from the stigma of illegitimacy, 5) fostering the stability of titles and inheritances, 6) protect the child from traumatic changes in family structure, and 7) promote speed and efficiency of the judicial system. Estate of Cornelious, 35 Cal. 3d 461, 465, 198 Cal. Rptr. 543, 674 P.2d 245 (1984), appeal dismissed 466 U.S. 967, 104 S. Ct. 2337, 80 L. Ed. 2d 812 (1984).

divorce, step-parents, and non-traditional families but the statute itself provides the mother and presumed father with the right to rebut the paternity presumption while denying Victoria the same right.

This disparity in treatment is significant for purposes of equal protection analysis in that whatever state interest is implicated in the statute, the mother and presumed father are entitled to seek the disruption of the very state interest which the state must paint as so compelling as to defeat the child's fundamental liberty interest.

All identified state interests, when analyzed and balanced against Victoria's fundamental rights, arguably fail to adequately shield section 621 from her equal protection claim. This balancing equation, however, is not reached.

Regardless of how noble or compelling the alleged state interests might be in the present context, the statute destroys its own presumed high purpose.

The state interest self-destructs where the statute allows the mother and presumed father to institute an action which will produce the same undesirable consequences that are relied upon to deny Victoria her day in court.

The issue, therefore, is not only whether the state interests are so compelling as to defeat Victoria's fundamental rights but also whether the statute's mechanisms to achieve the state interests are constitutionally defective. Section 621's mechanisms fail to pass constitutional muster. It is not sufficient that the state's interests be laudable or even compelling but the classification must be constituted in a

way to reasonably further the state's objectives "so that all persons similarly circumstanced shall be treated alike." Caban v. Mohammed, 441 U.S. 380, 391 (1979).

In the present case there is no legitimate reason or necessity for treating the mother or presumed father in a manner different from the way Victoria is treated. The guardian ad litem for the minor child can and should be able to take the same statutory steps, when deemed appropriate by the guardian ad litem, available to the other parties. Where the mother or presumed father can, according to their whims, institute an action which would effectively destroy the statutory objectives, then those objectives, however noble, fail to cure the invidious denial of Victoria's fundamental rights. California Evidence

Code section 621, as applied, unconstitutionally denies Victoria's right to equal protection.

II. THE MINOR CHILD WAS DENIED DUE PROCESS OF LAW BY HAVING A FATHER-CHILD RELATIONSHIP TERMINATED ON A MOTION FOR SUMMARY JUDGMENT WITHOUT ANY EVIDENCE AS TO THE CHILD'S BEST INTERESTS.

Victoria and her putative (biological) father enjoyed a functional parent-child relationship similar to that protected in Stanley v. Illinois, 405 U.S. 645 (1972) and Caban v. Mohammed, 441 U.S. 380 (1979); cf. Quilloin v. Walcott, 434 U.S. 246 reh'g denied 435 U.S. 918 (1978)(rights of biological father depend on father's assumption of significant degree of responsibility for the care and nurturing of child) and Lehr v. Robertson, 463 U.S. 248 (1983) (mere biological link does not warrant equivalent constitutional protection to

that of ongoing parent-child relationship).

The minor child enjoyed a father-child relationship with the putative father until the relationship was interrupted by the trial court's granting of a motion for summary judgment.
The result was a brutal and mechanical cessation of the ongoing parent-child relationship constituting an impermissible trenching of Victoria's due process rights.

In Michelle W., 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748, 752, appeal dismissed, 106 S.Ct. 774 (1986), the California Supreme Court reiterated its holding in Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975) that a once established parent-child relationship could not be defeated by a statutory conclusive presumption of paternity:

> Following the United States Supreme Court's decision in Stanley v. Illinois, supra, . . . we held that the Evidence Code's preclusion of proof of paternity offended the constitutional guarantee of due process of law.

Michelle W., supra, at 752.

An identical conclusion is the only constitutionally acceptable one in the case at bar. Section 621, as applied, prevents Victoria from determining her genetic and cultural heritage as well as stripping her of a healthy and beneficial relationship she enjoyed with the putative father. As applied, section 621 will prevent Victoria from determining if she has certain genetic propensities that might require specific medical attention or in the alternative she might be erroneously subjected to certain unnecessary medical treatment.

Further, Victoria's interests in continuing the relationship with the

putative father will not deprive her of any relationship she might enjoy with her mother or the presumed father. See Michelle W., supra, at 756-757 (Bird, C.J., dissenting). However, section 621, as applied, has a devastating effect on Victoria's relationship with her putative father without allowing her to present one shred of evidence as to what would be in her best interests.

The mechanical and brutal application of section 621 in the present context does violence to Victoria's right to due process. Devices, such as conclusive presumptions, which are tempting for judicial expediency, are poorly equipped to deal with the individual needs of children of diverse backgrounds who will have their lives so intimately shaped by such decisions. "No bond is more precious and none should be more

zealously protected by the law as the bond between parent and child." Carson v. Elrod, 411 F. Supp. 645, 649 (E.D. Va. 1976).

Decisions which will affect, in the most intimate and decisive fashion, a child's entire life must be made only after scrupulous adherence to the most demanding principles of due process.
A custody or paternity decision may be as heavy and grave a decision as any court is ever called upon to make. The impact such decisions have on the lives of the children involved is unquestionably of such a magnitude as to command a comprehensive consideration of all relevant matters by the trier of fact.

Such consideration was lamentably absent in the case at bar. The state's overriding obligation to promote the best interests of a minor child was ignored in

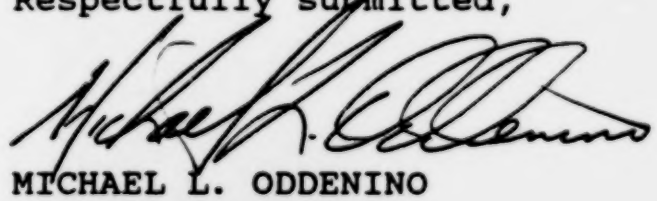
favor of expediency. The fundamental rights implicated in a section 621 determination, foreclose the possibility that the state could have other policy interests sufficient to justify Victoria's total deprivation of due process of law.

The facts of the instant case, as well as the ends of justice, dictate that the lower court's ruling be reversed. Only by restoration of her father-child relationship that was taken from her can the minor child have her fundamental rights protected. "It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." Ashby v. White, 2 Ld. Raym. 938, 953 (1703).

CONCLUSION

In light of the fundamental rights of the minor child, the denial of equal protection, the deprivation of due process, the nature of the loss suffered, and a compelling concern for the child's best interests, the lower court's summary judgment pursuant to Evidence Code section 621 should be reversed with appropriate instructions.

Respectfully submitted,



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